# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1978

## No. 78-161

STATE OF IOWA, STATE CONSERVATION COMMISSION
of the STATE OF IOWA,
*Petitioners,*

ROY TIBBALS WILSON, CHARLES E. LAKIN,
FLORENCE LAKIN; R.G.P. INCORPORATED,
DARRELL L. HAROLD, HAROLD M. and LUEA SORENSON,
HAROLD JACKSON, OTIS PETERSON and
TRAVELERS INSURANCE COMPANY,
*Respondents (Petitioners on Separate Petitions),*

vs.

OMAHA INDIAN TRIBE and the UNITED STATES OF AMERICA,
*Respondents.*

**On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

## AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, TEXAS, MONTANA, MINNESOTA, PENNSYLVANIA AND COLORADO, IN SUPPORT OF PETITIONER, STATE OF IOWA

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## JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. §1254(1), this Honorable Court has granted in part the petitions of the State of Iowa and of the State Conservation Commission of the State of Iowa for a writ of certiorari to review a decision of United States Court of Appeals for the Eighth Circuit.

The State of California, by and through its State Lands Commission and its Attorney General Evelle J. Younger, respectfully submits this brief as amicus curiae under authority of Rule 42(4), United States Supreme Court Rules. The States of Texas, Montana, Minnesota, Pennsylvania and Colorado, acting by and through their Attorneys General, join with California in this brief.

## INTEREST OF AMICUS CURIAE

This case presents issues that directly bear on the sovereignty of the States of the United States. The decision below touches both the sovereign authority of the States as well as their sovereign land titles. It departed from long-settled authority and applied "federal common law" to determine titles to land wholly within a State, and by application of federal common law and of Title 25 U.S.C. Section 194 (hereinafter "Section 194"), subjected the State of Iowa's absolute title to lands underlying navigable waters, acquired upon admission to statehood, to a federal principle of land title in contravention of the plain holding of *State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 374 (1977) (hereinafter "*Corvallis*").

The ramifications of the Eighth Circuit's decision are vast. If not overturned, the Court of Appeals' choice of law and use of the presumption purportedly created by Section 194 will disturb land titles, particularly titles to millions of acres of sovereign lands, in every State of the Union. The States' sovereign titles and their concomitant trust obligations have been established in our jurisprudence since *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). Cases of these sovereign rights in land have long been placed among the most important controversies before the Court, ". . . either as . . . respects the amount of property involved, or



the principles on which the . . . judgment proceeds . . . ." *Id.* at 235 (Catron, J., dissenting).

The acts of the Court below, if allowed to stand, could severely impinge on the sovereignty of the amicus States. For in the same capacity as the other States, the amicus States hold in trust for all their citizens title to millions of acres of sovereign lands. California for example is a party to litigation concerning the Colorado River in which the principles of this case could have marked effect. And also in these States are millions more acres of land whose landowners have relied for more than a hundred years on the continued application of state law to their titles. California and the other amicus States are thus vitally interested in the outcome of this case.

## QUESTIONS PRESENTED

1. Whether the application of a federal common law of river movement to determine title to land violates that attribute of a State's sovereignty which permits the State to make its own rules of title for lands within its borders, and particularly for lands which the State acquired as an attribute of sovereignty upon statehood.

2. Whether the application of Section 194 of Title 25, United States Code, to a State's claim of sovereign-land title violates the Equal-Footing Doctrine.

## SUPPLEMENTARY STATEMENT OF THE CASE

The United States Court of Appeals for the Eighth Circuit reversed a judgment in favor of Iowa and other non-Indian claimants, which had quieted title to lands in the present bed of the Missouri River and other lands directly

east thereof (hereinafter "Barrett Survey Area") against the Omaha Indian Tribe ("Omahas") and the United States, acting as trustee for the Omahas.

In December, 1846, Iowa was admitted to the Union and, so far as pertinent here, its western boundary made the center of the main channel of the Missouri River. By virtue of the sovereignty attained upon its admission, Iowa acquired title to the bed of the Missouri River east of its main channel and the concomitant authority to apply its own property law to lands within its borders. Eight years later, in March, 1854, the Omahas entered into a treaty with the United States. In that treaty the Omahas ceded certain lands to the United States and reserved ". . . for their future home . . ." other lands acceptable to the Omahas not to exceed 300,000 acres bounded on the *east* by the main channel of the Missouri River. Act of March 16, 1854, Art. 1, 10 Stat. 1043.[1] The Barrett Survey Area was at that time located within the Territory of Nebraska, west of the center of the main channel of the Missouri River.

Thus the center of the great Missouri River formed a common boundary between the lands of the Omahas and sovereign lands of the State of Iowa. The center of the River also became later the common political boundary between the State of Iowa and the State of Nebraska when Nebraska was admitted to the Union in 1867. *Nebraska v. Iowa*, 406 U.S. 117, 118 (1972).

The river has a capricious nature.

[1]In that same treaty, the Omahas relinquished their claims to lands lying east of the Missouri River. *Id.* at Art. 3, 10 Stat. 1044.



> "[It] is a vagrant, turbulent stream. Its name reflects this character. The Big Muddy is said to carry more silt than any other river except the Yellow River in China. It is constantly changing its course within the region between its bluffs, shifting from side to side as natural forces work upon its flow."
>
> *Kansas v. Missouri*, 322 U.S. 213, 216 (1944).

The rapid current of the Missouri River combines with its seasonal rises, and

> "[w]henever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great."
>
> *Nebraska v. Iowa*, 143 U.S. 359, 368 (1892).

Given these factors, it is no wonder that the shifts of the Missouri River have been constant and varied. In fact so numerous and intricate were shifts of the Missouri River that, by 1943, the interstate boundary between Nebraska and Iowa was impossible to locate. *Nebraska v. Iowa, supra,* 406 U.S. at 119.

The mercurial nature of the River is reflected in this case. By 1943, it had wandered more than two miles west of its assumed location in 1854. As a result the Barrett Survey Area, formerly located on the *west* (Nebraska) side of the Missouri River, was now located on the *east* (Iowa) side of the River.

The States of Iowa and Nebraska, recognizing the overwhelming difficulties in locating their common boundary after a century of such movements, agreed by compact to a permanent, fixed location of that boundary. *Nebraska*

*v. Iowa, supra,* 406 U.S. at 119; Iowa Code 1971, p. lxiv, Iowa Acts of 1943, c. 306; Nebraska laws 1943, c. 130. Congress approved the boundary compact. Act of July 12, 1943, 57 Stat. 494. Thus, the interstate boundary is now fixed and cannot be affected by this litigation. The dispute in this case rather is whether the movement of Missouri, the common *property* boundary between the Omahas' reservation and the State of Iowa's sovereign river lands, resulted from the gradual and imperceptible process of accretion and erosion, as asserted by Iowa and the non-Indian claimants (who are Iowa riparian landowners), or from the sudden and perceptible process of avulsion, as claimed by the Omahas and the United States.

The non-Indian claimants or their predecessors in interest had occupied the land from the early 1900's until April 2, 1975, when the Omahas, with assistance of the Bureau of Indian Affairs, seized possession of the land and began farming it. Thereafter, the Omahas brought this suit to quiet title to the Barrett Survey Area now lying in Monoma County, Iowa. Iowa and the non-Indian claimants asserted title to that same area and also sought to quiet title thereto.

Iowa and the non-Indian claimants contend that the Barrett Survey Area was washed away by gradual river action, that the lands now located in the Barrett Survey Area are alluvial deposits to Iowa riparian land and that by this process the common property boundary between Iowa's sovereign lands and the Omahas' lands moved westward.

At trial, the District Court determined that each side would bear the burden of persuasion as to the facts establishing their respective claims, disregarding Section 194



which the Omahas and the United States claimed reallocated such burden to Iowa and the non-Indian claimants. *United States v. Wilson,* 433 F.Supp. 57, 66 (N.D. Iowa 1977) (hereinafter *"Wilson I"*). The District Court found that the River, and hence the common property boundary, had moved westward through the process of accretion and erosion as contended by Iowa and the non-Indian claimants. It further found that the United States and the Omahas failed to prove that the river moved by any sudden change. Title to the disputed lands was therefore quieted in Iowa and the non-Indian claimants. *United States v. Wilson,* 433 F.Supp. 67, 88-92 (N.D. Iowa 1977) (hereinafter *"Wilson II"*).

On appeal, the Eighth Circuit reversed, holding that federal common law and not the state law of river movement should have been applied. Moreover, it applied Section 194 to all defendants, having found historical possession or ownership by treaty to the lands within the perimeter boundaries of the Barrett Survey Area as those lands existed in 1854. Moreover, it applied Section 194, having found that the Omahas had enjoyed historical possession or ownership by virtue of the Treaty to the area encompassed within the perimeter boundaries of the Barrett Survey Area. In making this finding, the Eighth Circuit ignored the problem whether post-1854 changes in the course of the Missouri River constituted a continuing shift of the boundary of the lands owned or possessed by the Omahas. Thus, pursuant to Section 194, Iowa and the non-Indian claimants were required to assume the burden of proving the common boundary shifted by reason of accretion and erosion. *Omaha Indian Tribe, Treaty of 1854, etc. v.*

*Wilson,* 575 F.2d 620, 650-651 (8th Cir. 1978) (hereinafter *"Wilson III"*). Holding further that Iowa and the non-Indian claimants failed to sustain what it recognized as "indeed an onerous burden" of proving events occurring more than 100 years ago, the Court of Appeals vacated the District Court's judgment and remanded the case with directions to enter judgment quieting title to the Barrett Survey Area—including river lands in the present bed of the Missouri River—in the Omahas and the United States as trustee. *Id.* at 651.

## SUMMARY OF ARGUMENT

This writ is a consequence of two fundamental errors of the Eighth Circuit: that this property-boundary dispute "concerns" the political boundary separating Iowa and Nebraska, and that the title claims of the non-Indian claimants are an attempt to abrogate property rights of the Omahas granted by treaty.

The political boundary between the States of Iowa and Nebraska was fixed in location in 1943 by compact. Nothing that could be adjudicated in this case could in any manner dislocate that boundary, for neither is it an issue in the case, nor is Nebraska a party. Contrary to the opinion of the Court below, the interstate boundary is simply not concerned. *Wilson III, supra,* 575 F.2d at 628-629. Even if that line had not been fixed by compact however, and its location were put in issue in this case, nothing in the use of federal common law to locate that *political* boundary would in any way derogate from the principle that state law governs the location of *property* boundaries.



Furthermore, this case presents no issue of the interpretation of a federal grant, nor of the Treaty with the Omahas. The issue is what incidents of riparian ownership attach to the grant to the Omahas. These incidents are not determined by construction of the grant but by examination of state law. For they exist not by virtue of the grant, but by operation of the law of the state in which the lands lie.

No exception should be made to the fundamental tenet of our federalism that the States may establish for themselves rules respecting the title and boundaries of real property. This principle holds as to all classes of land, including lands owned by Indians. But when the title to or boundaries of sovereign lands are questioned, there is an added reason for unwavering adherence to it. For the title of a State to its sovereign lands, that is,

> ". . . lands underlying navigable waters within its boundaries [,] is conferred not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is *absolute so far as any federal principle of land titles is concerned.*" (Emphasis supplied.) *Corvallis, supra,* 429 U.S. at 374.

Thus the use by the Court below of a "federal common law" of river movement—of accretion and avulsion—violated two attributes of Iowa's sovereignty: first, that attribute which permits the States to make their own rules of real-property boundaries and titles; and second, that attribute which vested in Iowa, eight years before the Treaty with the Omahas, a title to her sovereign lands "absolute so far as any federal principle of land titles is concerned."

By applying section 194 to Iowa's claim to sovereign lands, the Eighth Circuit again violated this second attribute of Iowa's sovereignty.

## I

## FUNDAMENTAL PRINCIPLES OF FEDERALISM HAVE LONG COMPELLED THE USE OF STATE LAW TO RESOLVE CONFLICTING CLAIMS TO REAL PROPERTY, ESPECIALLY WHEN ONE OF THE CLAIMS IS THAT OF A STATE TO ITS SOVEREIGN LANDS

The Tenth Amendment and the Equal-Footing Doctrine preserve and protect the sovereign power of each State to establish for itself a system of laws for determining title to land within its borders. In choosing to apply federal law in a property-boundary dispute—this is not a political-boundary dispute—the Eighth Circuit vitiated constitutional principles of fundamental importance to the federal system, revived the long-interred doctrine of federal common law and raised the distinct possibility of two systems of law for determining land-title disputes—one for Indians (and their non-Indian neighbors), and one for non-Indians (having no Indian neighbors).

The classic expression of the force of the Tenth Amendment is found in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). In that case, Justice Brandeis, after setting forth the reasons for the decision and the background of the rule of *Swift v. Tyson,* 16 Pet. 1 (1842), wrote for the Court:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no



> federal general common law. Congress has no power to declare substantive rules of common law applicable in any case is the law the State. . . . There is no ports to confer such a power upon the federal courts. . . .
>
> [In applying the doctrine of *Swift v. Tyson*] *this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." Id.* at 78-80. (Emphasis added.)

Significantly, even when the lessons of *Swift* were in vogue, "federal common law" did not govern real-property disputes. An exception was made for the local law of real property because of the immovable and intra-territorial nature of real property. *Swift, supra,* 16 Pet. at 17-18. As most recently uttered in *Corvallis,* "[u]nder our federal system property ownership is not governed by a general federal law, but rather by the laws of the several States." *Corvallis, supra,* 429 U.S. at 378.

The Equal-Footing Doctrine too defines the sovereign authority of the States to govern the titles to real property within their borders. And it defines in addition another fundamental attribute of that sovereignty, the States' titles to lands beneath navigable waters. Mr. Justice Stewart, dissenting in *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), delineated the contours of the Equal-Footing Doctrine as it was to be reaffirmed by a majority of the Court three years later in *Corvallis, supra,* 429 U.S. at 381-382, as follows:

> "I think this ruling [the majority opinion in *Bonelli*] emasculates the equal-footing doctrine, under which this Court has long held 'that the new States since

admitted have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders.' . . .

"After the Revolution, the 13 Original States succeeded both to the Crown's title to the beds underlying navigable rivers and to its sovereignty over that property. . . . '[T]he shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several States.' . . . If the equal-footing doctrine means what it says, then the States that were later admitted to the Union must hold the same title and must exercise the same sovereignty. . . . *Just as with other real property within the State's boundaries, an element of sovereignty over the property constituting the riverbed is the power of the State's courts to determine and apply state property rules in the resolution of conflicting claims to that property.*" *Bonelli, supra,* 414 U.S. at 332-333. (Stewart, J., dissenting.) (Citations omitted; emphasis supplied.)

These constitutional principles operate to assure that within each State there exists an integral, consistent local scheme of land title based on the pertinent geographical, geological, legal, or political considerations applicable in each State, under which purchasers and sellers of real property can make rational judgments concerning the nature and extent of land title conveyed and delivered in each State. Whether title derives from the federal government or from other sources, these principles require that local real-property rules obtain.

This long-standing principle was enunciated early in *Wilcox v. Jackson,* 13 Pet. 496 (1839). There the Court stated:



". . . [W]henever the question in any Court, State or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but . . . whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." *Id.* at 517.

This precept has been followed in a long line of cases concerning land titles derived from the United States and bounded by a water boundary. *Barney v. Keokuk,* 94 U.S. 324, 337 (1876); *Packer v. Bird,* 137 U.S. 661, 669 (1891); *St. Louis v. Rutz,* 138 U.S. 226, 242 (1891); *Joy v. St. Louis,* 201 U.S. 332, 342 (1905); *Corvallis, supra,* 429 U.S. at 378.

In *Joy,* it was determined that a mere claim to land under a federal confirmatory patent was not sufficient to provide federal-question jurisdiction. *Joy, supra,* 201 U.S. at 340. In so doing, the opinion addressed the precise issue now confronting this Court:

". . . [T]he controversy in dispute is not at all in regard to the land covered by the letters patent or by the acts of Congress, and no dispute is alleged to exist as to such land, but the dispute relates to land, 'which land is a portion of the land formed by accretions or gradual deposits from said river, . . . and which thereby became a portion of the land granted by said letters patent and acts of Congress. . . .'

"Now, whether the land contained in the original patent reached to the Mississippi river as its eastern boundary, . . . would be a question of fact . . . and

whether the plaintiff is, upon the facts set forth, entitled to the accretion, is a question of local or state law, and is not one of a Federal nature. . . . [Citations omitted.]

"As this land in controversy is not the land described in the letters patent or the acts of Congress, but, . . . is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, . . . a matter of local or state law, and not one arising under the laws of the United States." *Id.* at 342-343.

This case presents no question as to what passed out of the public domain to the Omahas by the Treaty of 1854. The Omahas were granted lands bounded on the east by the center of the Missouri River, and as all parties agree, that boundary under federal law is the thalweg.[2] *Iowa v. Illinois*, 147 U.S. 1, 13 (1893). Nor is there any question but that the boundary was intended as an ambulatory boundary, moving with gradual and imperceptible changes in the location of the thalweg, and not as a fixed boundary. *See Jones, et al. v. Johnston*, 18 How. 150, 156 (1855). The question here is simply whether state or federal law governs the effect of subsequent river movements upon the boundary, and as we have seen, the effect of those movements is governed by state law. *Joy, supra,* 201 U.S. at 342-343.

The decision in *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), did not change the rule of *Joy*. That case held that any question of the *initial* boundary of a federal grant bordering on sovereign lands was to be determined accord-

[2]The thalweg is the center of the main channel of navigation. *Iowa v. Illinois*, 147 U.S. 1, 8 (1893).



ing to federal law. Similarly, if there were any question here (and there is not) whether the boundary of the Omahas' lands was in fact the thalweg, that question would be resolved by federal law. The decision in *Corvallis*, addressing the two attributes of state sovereignty in issue here, made clear that *Borax* and certain subsequent cases[3] were not authority to apply federal law to determine the effect upon the boundary of subsequent changes in the watercourse (in the case of *Borax*, the shoreline):

". . . [The *Borax*] principle would require that determination of the initial boundary between a riverbed, which the State acquired under the equal-footing doctrine, and riparian fast lands likewise be decided as a matter of federal rather than state law. But that determination is solely for the purpose of fixing the boundaries of the riverbed acquired by the State at the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended and the land is subject to the laws of the State. The expressions in *Bonelli* suggesting a more expansive role for the equal-footing doctrine are contrary to the line of cases following *Pollard's Lessee.*" (Footnote omitted.) *Corvallis, supra,* 429 U.S. at 376-377.

A final point must be made. While the Court of Appeals recognized the principle set out hereinabove, *Wilson III, supra,* 575 F.2d at 629, it revealed a crucial misunderstanding of fundamental property law when it wrote:

"In *Packer v. Bird* [citations omitted] the Court observed:

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States

[3]*Hughes v. Washington*, 389 U.S. 290 (1967); *Bonelli, supra.*

> for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of property by the grantee.
>
> "The present dispute is not related to incidents or rights flowing from a conveyance of public lands or related to a patent grant of Indian allotment lands. Instead, the direct challenge made by the Iowa landowners here affects the boundary line to the reservation land itself. . . ." *Id.*

The present dispute is precisely "related to incidents or rights flowing from" the Government's grant to the Omahas. The "incidents or rights" spoken of by the *Packer* Court are those relating to the riparian nature of the grant. *Packer v. Bird, supra,* 137 U.S. at 669-70. They include the right of accretion, the risk of erosion, and the right to a fixed boundary if the river moves by avulsion. True, the "courts of the United States will construe the *grants* of the general government without reference to the rules of construction adopted by the States for their grants." (Emphasis added). *Id.* at 669. Such construction would be used to determine, for example, the meaning of a mineral reservation, whether the grant is subject to a condition subsequent, and what the initial boundary of the grant was intended to be. (All parties agree the thalweg was intended and not a line fixed at the 1867 location of the thalweg.) But thereafter, as *Corvallis* held, the force of federal law is spent, and the effect of any changes in the river upon the boundary must be determined according to state law. *Corvallis, supra,* 429 U.S. at 376-381.



It is this fundamental principle of federalism that amici urge the Court to continue to affirm.

## II

## NO SOUND REASONS EXIST FOR THE EXCEPTIONS PROPOSED TO THE PRINCIPLE THAT STATE LAW GOVERNS CONFLICTING CLAIMS TO REAL PROPERTY

### A. The Assertion that an Interstate Boundary Is "Concerned" Is a Misconception, and Affords No Basis for Applying Federal Law.

The Eighth Circuit reasoned, improperly seizing upon language in *Corvallis, supra,* 429 U.S. at 375, that because the center of the main channel of the Missouri River once constituted the political boundary separating Iowa and Nebraska, federal law must be applied to resolve the property boundary in dispute herein. (In the Barrett Survey Area, the center of the Missouri's main channel ceased being the political boundary upon the ratification of the Compact in 1943 at the latest. It may have ceased being the political boundary even earlier, if it had jumped places by avulsion.) It is indisputable that federal law applies to determine the location of political boundaries separating States. *Id.; Nebraska v. Iowa, supra,* 143 U.S. 359.

But the Eighth Circuit misapprehended the relationship between the political boundary of a State, when the center of a stream is made that boundary, and the property boundaries of land riparian to that stream. When the political boundary and a property boundary are congruent it is not because each is determined by the same system of law; it is merely fortuitous.

The error of the Eighth Circuit is immediately apparent when it is reflected that no interstate boundary is "concerned" at all. That boundary was fixed by Compact in 1943. Since this is not an action between Iowa and Nebraska, nothing that could be adjudicated in this case can "press back the boundary line from where otherwise it should be located." *Arkansas v. Tennessee,* 246 U.S. 158, 176 (1918). But the Eighth Circuit's misapprehension is far more profound, and bears careful scrutiny:

> "In this case any claim that the reservation's eastern boundary had changed would of necessity have concerned the interstate boundary between Iowa and Nebraska, at least until 1943, thereby invoking federal law *since both boundaries were located at the thalweg of the Missouri River.*" (Emphasis added.) *Wilson III, supra,* 575 F.2d at 628.

In this sentence, the court begs the very question it should have addressed, *i.e.,* whether both the political and the property boundaries were *necessarily* located at the same place in 1943. If we imagine that this dispute arose before the political boundary between Iowa and Nebraska became fixed by Compact, and that the location of that political boundary is uncertain, the error comes clear. It is necessary, to be sure, to locate that boundary so that it is known in which State the disputed lands lie. For this purpose the application of federal common law is made. *Corvallis, supra,* 429 U.S. at 575; *Nebraska v. Iowa, supra,* 143 U.S. 359. To this proposition there can be no dispute, for the evils that would attend the use of the law of either State to determine the political boundary are manifest. *See Iowa v. Illinois, supra,* 147 U.S. at 4-6.



But the determination of the political borders of a state does not of its own force adjudicate land title. When the political boundary is ascertained, the disputed land is found either all in Iowa, all in Nebraska, or partly in each. To determine title to land in Iowa, Iowa law is applied, and to land in Nebraska, Nebraska law. See *Nebraska v. Iowa, supra,* 406 U.S. at 126.

Confusion has arisen largely because in many instances —indeed possibly in this—a state's law of riparian *property* boundaries parallels the federal common law of *interstate* boundaries. For while the two bodies of law have different roots, the law of interstate boundaries has borrowed in certain instances principles from the law of property boundaries. The laws of riparian *property* boundaries derive in most States from the common law (in Texas, for example, in part from the civil law). *See New Orleans v. United States* 10 Pet. 662, 717 (1836); 7 Powell on Real Property, 610 n. 11, 611 (Rev. ed. 1977); *Luttes v. State* 324 S.W.2d 167 (Tex. 1958). The federal common law of *political* boundaries within streams, on the other hand, finds its roots in international law. *Iowa v. Illinois, supra,* 147 U.S. at 2, 8; *Arkansas v. Tennessee, supra,* 246 U.S. at 170. From international law then, this Court has chosen the fundamental principle for determining the boundary between two states separated by a navigable stream, the "thalweg principle." *Iowa v. Illinois, supra,* 147 U.S. at 13. Having done so, it has then borrowed from the more familiar common law of riparian property boundaries certain subsidiary principles. These principles are used to determine the effects of changes in the course of the thalweg upon the political boundary. *See, e.g., Arkansas*

*v. Tennessee, supra,* 246 U.S. at 173. But this general body of common law of course is not uniformly followed by the States in treating *property* boundaries. *See, e.g., id.* at 176.

*Arkansas v. Tennessee* itself makes clear that once the interstate boundary has been located, boundaries and other attributes of *property* are to be determined according to the law of the State in which the property lies.

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them." *Id.* at 175-176.

The court observed that Arkansas and Tennessee differed in their domestic laws respecting the ownership boundaries of riparian land. *Id.* at 176. It then concluded its discussion with this remark, which the Court below oddly felt supported the application of federal law to determine property boundaries (*Wilson III, supra,* 575 F.2d at 628):

> ". . . But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located." *Arkansas v. Tennessee, supra,* 246 U.S. at 176.

Nothing could be truer, nor more self-evident. For if the *political* boundary were not determined by resort to a uniform system, intolerable results would follow. By way of illustration it was noted:

> ". . . The decision of the Supreme Court of Tennessee in *State v. Muncie Pulp Co.,* 119 Tennessee, 47, sustained the claim of the State to a part of the abandoned river bed which, by the rule of the *thalweg,* would be without that State." *Id.* at 172.



Nor is there any reasoning in *Corvallis* to the contrary. *Corvallis,* in noting that federal law applied in interstate-boundary disputes, relied on the cases amici have discussed above, *Nebraska v. Iowa, supra,* 143 U.S. 359, and *Arkansas v. Tennessee, supra,* 246 U.S. 158, as authority for that conclusion. *Corvallis, supra,* 429 U.S. at 375. But the imperative rule that political boundaries are to be determined by resort to federal common law in no way derogates from the other inveterate principle that boundary shifts and other incidents of property ownership are to be determined according to the laws of the State in which the lands lie. Thus, nothing in the assertion that an interstate boundary is "concerned" (which is not the case here) compels the application of federal law to this property-boundary dispute between the Omahas and the State of Iowa.

### B. State and Not Federal Law Applies to Resolve Real-Property Boundary Disputes Between Indians and Non-Indians.

The Court of Appeals also wrote that the "special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated require application of federal law to decide the issues of river movement in this case." *Wilson III, supra,* 575 F.2d at 628-629.

Such a rule would create an aberration, not only from the *Pollard, Joy,* and *Corvallis* line of cases, but also from cases relating to the boundaries of lands granted to Indians by treaty.

In *Francis v. Francis,* 203 U.S. 233 (1906), the issue was whether, in the absence of a government patent, a clause in a treaty reserving land for the chief of an Indian tribe was sufficient to pass fee title. The Court said:

> ". . . That the construction of the treaty here involved, whereby the respective Indians named in its third article are held to have acquired by the treaty a title in fee for the land reserved for the use of themselves, *has become a rule of property in the State where the land is situated.* That rule of property should not be disturbed, unless it clearly involves a misinterpretation of the words of the treaty. . . ." (Emphasis supplied.) *Id.* at 242.

Thus the Court deferred to a state rule of property for construction of a United States treaty. Where as here no construction of a treaty is necessary, and hence no risk of misinterpretation, an even stronger case is made for the application of state rules to determine the common property boundary between the Omahas' lands and the lands of the competing claimants. *Francis'* deference to state rules of property was a recognition that even in cases of Indian land claims, state property law, created from the circumstances peculiar to the State, should apply to all land within the State. Consistency and certainty of result require as much, and later cases develop this reasoning.

In *Oklahoma v. Texas,* 258 U.S. 574 (1922), the United States intervened in a dispute between the two States over their common boundary along the Red River, in part because of the United States' relation to Indian allottees who were riparian to the river. *Id.* at 579, 582. The Court, having held that the United States owned the bed of the nonnavigable Red River, *id.* at 591, stated:



> "Where the United States owns the bed of a nonnavigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, that intention will be controlling; [footnote omitted] and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies. [Footnote omitted.] Where it is disposing of tribal land of Indians under its guardianship the same rules apply." *Id.* at 594-595.

*See Brewer Oil Co. v. United States,* 260 U.S. 77, 88-89 (1922).

In this case of course there is no dispute as to the intent of the United States at the time of creation of the Omahas' Reservation. The Omahas' reservation lands were bounded on the east by the center of the main channel of the Missouri River. Act of March 16, 1854, Art. 1, 10 Stat. 1043. This boundary was an ambulatory line, not a line fixed in location at the time of the grant. *Fontenelle v. Omaha Tribe of Nebraska,* 298 F.Supp. 855, 860 (D. Neb. 1969) (hereinafter *"Fontenelle I"*), *aff'd.,* 430 F.2d 143 (8th Cir. 1970) (hereinafter *"Fontenelle II"*). The Omahas' reservation lands did not and were not intended to include any lands east of that boundary, as the Omahas

relinquished all their rights in such lands by their treaty. Act of March 16, 1854, Art. 3, 10 Stat. 1044.

Significantly, if any intention of Congress may be inferred from the Omahas' treaty, it is that state law govern property questions respecting the reserved lands. The treaty provides that the President may issue patents for portions of the reservation lands to Indians who wish to locate a permanent home. The patents were to be made subject to the condition that the patented tracts could not be conveyed for two years,

> ". . . and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions." Act of March 16, 1854, Art. 6, 10 Stat. 1044-1045.

In the only previous case to have considered the effect of a movement of the River upon the boundary of these same Omahas' lands, the district court, affirmed by the Eighth Circuit, held that state and not federal law determined the location of that boundary. *Fontenelle I, supra,* at 861; *aff'd., Fontenelle II, supra.*

State law was also applied in *U.S. v. Oklahoma Gas Co.,* 318 U.S. 206 (1943). In that case, a federal statute permitted Oklahoma to construct a highway across allotted Indian lands. The question was whether Oklahoma could in turn permit the Oklahoma Gas Co. to place electrical service lines over a portion of the highway. *Id.* at 207. The United States argued that its permission to Oklahoma did not submit the scope of the highway use to determination under state law. The Court refused to hold that Congress



intended to limit such a grant in a matter so "commonly subject to local control," stating:

> "It is well settled that a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary intention, according to the law of the State where the land lies." *Id.* at 209-210.

There being, the Court held, no ". . . governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary . . .", state law would be applied. *Id.* The Court went on:

> "The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subject only to the same rule of law as are others in the State. . . .
>
> "Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear." *Id.* at 211.

Thus *Oklahoma Gas* requires at the least an unequivocal expression from Congress before federal law may usurp a State's law of real property. No such Congressional intent can be shown here. In fact, in the Treaty with the Omahas Congress appears to have intended specifically no breach of state sovereignty in real-property matters, since the Treaty expressed an intent that certain incidents of the

Omahas' property rights were to be governed by state law. Act of March 16, 1854, Art. 3, 10 Stat. 1044. Also it cannot be shown that the application of federal law is necessary to fulfill the policy of Congress to protect Indians "against their own improvidence or the overreaching of others." Application of state law to determine the effect of acts of nature upon the property boundary separating lands of an Indian tribe from those of a sovereign State cannot responsibly be asserted to be contrary to any Congressional policy in favor of Indians. Nor has any showing been made that application of the state rules of river movement urged by Iowa would subject the Omahas to any different or additional burden from that of any other litigant in a case of this nature.

This Court has thus consistently held that Indian land titles are subject to the same state laws of real property that apply to other lands within the State. The Tenth Circuit is in accord. *Herron* v. *Choctaw and Chickasaw Nations,* 228 F.2d 830, 832 (10th Cir. 1956); *Choctaw and Chickasaw Nations* v. *Seay,* 235 F.2d 30, 35 (10th Cir. 1956), *cert. den.* 352 U.S. 917 (1956); *see U.S.* v. *Champlin Refining Co.,* 156 F.2d 769, 773 (10th Cir. 1946), *aff'd per curiam* 331 U.S. 788 (1947); *see also Stone* v. *McFarlin,* 249 F.2d 54, 56 (10th Cir. 1957). The *Seay* decision is particularly apropos. In that case the court resolved a dispute between the tribe and a subsequent allottee of a portion of the tribe's reservation lands concerning the boundary of the reservation by applying state law. *Seay, supra,* 235 F.2d at 35.

The Eighth Circuit relies heavily on *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974), for their assertion that state law may not be applied in this case.[4] *See Wilson III, supra,* 575 F.2d at 630. In *Oneida,* litigation was instituted in federal court by the Oneida Tribe alleging that 1788 and 1795 cessions by the Tribe to the State of New York were without consent of the United States and thus did not terminate the Indians' aboriginal rights. *Id.* at 664-665. The Court held that the Oneida Tribe's assertion of a right to possession, termed "aboriginal title," was that of a right conferred by federal law. *Id.* at 666. It explained that under accepted doctrine only the United States could terminate aboriginal title, *id.* at 667, and that through the passage of the Non-Intercourse Act in 1790, Act of July 22, 1790, 1 Stat. 137, the United States had asserted federal primacy in the area. *Id.* Since the Oneidas' aboriginal right of possession had been recognized by the United States, *id.* at 668-669, and thus arose under federal law, *id.* at 675, the Court wrote:

> "In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Id.* at 677.

[4] Reliance, albeit misplaced, is also given to *Confederated Salish & Kootenai Tribes* v. *Namen,* 380 F.Supp. 452, 461 (D. Mont. 1974, *aff'd,* 534 F.2d 1376 (9th Cir. 1976), *cert. denied,* 429 U.S. 929 (1976). That case involved the question whether a riparian allottee of land wholly within an Indian reservation had the right to wharf out over a lake bed held by the United States in trust for Indians. Neither the facts nor the issue in that case are remotely related to the matters before the Court here.

But unlike *Oneida*, this case presents no issue of aboriginal title or wrongful termination thereof. The Omahas' rights are circumscribed by the Treaty of 1854, pursuant to which the Tribe relinquished all title claims to lands east of the main channel of the Missouri River, and received from the United States lands west thereof. Unlike New York in *Oneida*, Iowa is not trying to extinguish without the approval of Congress an aboriginal right of possession that only Congress can extinguish; Congress has already extinguished that title and substituted a specific grant of lands in lieu of it. And certainly Iowa is not contending that the Treaty of 1854 is invalid, or that the Omahas took no lands thereby. On the contrary, all parties recognize the validity of the Treaty, and of the Omahas' title thereunder. And all recognize that the eastern boundary of the reservation lands was made the center of the main channel of the Missouri River, that this boundary was intended as an ambulatory boundary, and that the River has moved in location markedly since 1854. The question is simply the effect upon the location of the boundary of those movements of the river, and Iowa asserts, quite correctly, that that effect must be determined according to state law.

### C. No Showing Has Been Made That the Application of a Federal Common Law of River Movement Would Promote the Federal Interest In Protecting the Rights of the Omahas. On the Contrary, It Is Clear That Applying State Law Would Advance That Interest.

In *U.S. v. Standard Oil Co.*, 332 U.S. 301 (1947), this Court set forth considerations to influence choice of law



when it is asserted a strong federal interest compels the application of federal law. These considerations are the nature of the specific governmental interests, the effect upon these interests of applying state law, federal supremacy in the performance of federal functions, the need for uniformity and the need of a State to apply its own laws. *Id.* at 309-310. In *Wallis v. Pan American Pet. Corp.*, 384 U.S. 63 (1966), the Court allowed the application of state law to determine the transferability of a federal lease. *Id.* at 71. The Court found there was no significant conflict between the application of state law and the federal interest, *id.* at 68, nor any

> ". . . showing that state law is not adequate to achieve it." *Id.* at 71.

These considerations are pertinent here. Nothing offered by the Eighth Circuit, the Omahas or the United States lends any credible support to the assertions that the choice of federal common law is necessary to promote the Government's interest in protecting the rights of Indians. Certainly the United States has such an interest. But it is not enough to assert that the law of one jurisdiction should apply simply because that jurisdiction has a policy it wishes to advance. It must be shown that the application of state law would significantly conflict with the Government's interest, or that application of federal law would promote that purpose. *Wallis, supra*, 384 U.S. at 68, 71; Restatement (Second) of Conflict of Laws § 6, Comment (1971); E. Cheatham and W. Reese, *Choice of the Applicable Law*, 52 Col. L. Rev. 959, 965, 972 (1952). Here, no such showing has been made.

To avoid the application of state law, the United States declares incredibly that "[t]o apply state law in the instant case would, in effect, permit the state unilaterally to abrogate rights created by treaty and continuously protected by the United States." Brief for the United States in Opposition to the Petitions for a Writ of Certiorari, p. 15. This statement is untrue. Continuing to allow the States to apply their own laws to property would give them no more ability to "abrogate" property rights than they would otherwise possess. For no State can abrogate property rights without affording the constitutional guarantees of equal protection, due process, and of course just compensation. The characterization of this lawsuit by both the United States and the Court below as an attempt "to abrogate" or "extinguish title to tribal reservation land," *id.*, *Wilson III, supra,* 575 F.2d at 629, 630, is question-begging. The attempt here is not to "extinguish" but to ascertain the true titles to disputed lands, and the geographical extent of those titles. Ironically, the Eighth Circuit's decision quiets the Omahas' title to lands *beyond* the 1867 Barrett Survey line, lands that accreted to the Omahas' side of the river after that survey. If the United States and the Eighth Circuit are to be consistent, should not this case be characterized also as an attempt by the Government and the Omahas to "extinguish" the titles of Iowa and the Iowa riparian landowners?

No more than can the use of state law be shown to frustrate the Government's interest can the application of federal law be shown to promote that interest. The Eighth Circuit offers no explanation how the application of the federal law of accretion and avulsion promotes the Government's interest. *See Wilson III, supra,* 575 F.2d at 629-631. Nor does the United States attempt such an explanation in its brief in opposition to the petitions for writs of certiorari herein (see pages 14-16 thereof). Only in its brief in the Court below does the Government even approach the question. It offered this vague explanation how the use of federal law would promote the Indians' interests:



> "The federal law of avulsion and accretion, to the degree that it is different from state law, should apply here. We would only point out that that law does not deal solely with clear-cut rules, but balances competing policies of the law." Brief for the Appellant, United States of America, Appellant, v. Roy Tibbals Wilson, et al., U.S. Court of Appeals for the Eighth Circuit, No. 77-1387.

The Government cannot even say whether federal law differs from the state law of accretion and avulsion, let alone demonstrate how the application of federal law promotes its interest. (It may well be that the result would have been the same had state law applied.[5]) It has, however, made a case for the application of state law. The United States appears to concede the federal law of river-boundary changes lacks the precision, predictability and thorough development of state-law systems. Even the Eighth Circuit could not say, for example, whether the body of federal common law contains the principle quite common among state-law systems, that river movements are presumptively

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[5]Interestingly, as to lands within the present political borders of Iowa, Iowa law may require the application of Nebraska law as to any lands that were within the borders of Nebraska prior to the 1943 Compact. Iowa-Nebraska Boundary Compact, Iowa Code 1971, p. lxiv, Iowa Acts 1943, c. 306, § 3. The content of Iowa's law of course, is not of consequence here.

accretive and not avulsive. *Wilson III, supra,* 575 F.2d at 632 n. 22.[6] The *Erie* Court was quite correct, for more reasons than one, in declaring "There is no federal general common law." *Erie R. Co., supra,* 304 U.S. at 78.

> "*Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of every day affairs." *Hanna v. Plumer,* 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

So it is plain, we submit, that the interests of the Indians would be far better served if their lands were subject to the same laws as the lands of other citizens of the State. For without the uncertainty as to what rule a federal court might fashion for each occasion, an Indian's title could be analyzed in the clear light of a fully developed state-law system. The selection of state law would achieve uniformity of result, predictability of result, and ease of application, all factors that should be considered in choosing the applicable law. *See* Restatement (Second) of Conflict of Laws § 6 (1971); Cheatham and Reese, *supra.*

Plainly chaos would result if the Eighth Circuit's decision is upheld. For we would not simply have a system of federal common law for property owned by Indians, and a system of state law for property owned by non-Indians. Since boundary determinations affect the landowner on each side of the boundary, federal common law would constitute the law applicable to Indians, as well as their

[6]There is in fact such a presumption. *See Mississippi* v. *Arkansas,* 415 U.S. 289, 294 (1974), approving the Special Master's report, which was predicated on the presumption, and citing with approval *Pannell* v. *Earls,* 483 S.W.2d 440, 442 (Ark. 1972).



non-Indian neighbors. Only non-Indians having no Indian neighbors could be certain that their titles would remain subject to state and not federal law, at least until an Indian acquires the property next door. And if Indian property rights are to be construed according to federal common law, do we have the same result when the Government asserts it has a special interest in promoting the welfare of other classes of persons who may have been disadvantaged? And if Indians are to have their land titles construed according to federal law, what of their contracts, or their torts? This Court foresaw long ago that chaotic consequences could follow from adopting two discrete systems of land law within a State:

> "The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the over-reaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State . . . .
>
> "Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear." *U.S. v. Oklahoma Gas Co., supra,* 318 U.S. at 211.

## III

## SECTION 194 MAY NOT CONSTITUTIONALLY BE USED TO DEFEAT A STATE'S CLAIM UNDER THE EQUAL-FOOTING DOCTRINE TO SOVEREIGN LANDS

In an unprecedented decision, the Eighth Circuit applied Section 194 to the State of Iowa (as it did to the other non-Indian claimants), requiring Iowa to assume the burden of persuasion upon its claims to sovereign lands. Iowa's failure to prevail on those claims is in large measure attributable to that application of Section 194, which amici contend was unconstitutional.

Section 194 provides that in trials between an Indian and a white person concerning property, the burden of proof is placed on the white person ". . . whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." Application of Section 194 in this case raises several questions: whether the statute by its own terms applies to this controversy;[7] whether it violates the equal-protection guarantees of the Constitution; and whether it violates the Tenth Amendment's guarantee that the States may apply their own laws to determine titles to lands within their borders. We do not address these questions, which we understand will be adequately treated by the parties and by other *amici*, but we do address another: whether the statute may be applied against a State asserting its title to sovereign lands.

[7]Certainly by its own terms the statute does not apply to the State of Iowa, for Iowa can in no sense be deemed a "white person." It is a sovereign entity composed of people of all races, including Indians.



The Eighth Circuit found that the ". . . [Omahas'] treaty established the [Omahas] as the legal titleholder to the land area within the Barrett Survey [Area, including lands in present bed of the Missouri River claimed to be sovereign lands of Iowa.]" *Wilson III, supra*, 575 F.2d at 631. This finding, the Court held, raised the presumption of title required by Section 194. *Id.* Having thus found "previous possession or ownership[8] based upon physical conditions obtaining in 1867, the Eighth Circuit held

> ". . . notwithstanding the subsequent movement of the thalweg of the Missouri River, the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question." *Wilson III, supra,* 575 F.2d at 633.

Thus, Iowa was required to prove the Omahas did not have lawful title to the bed of the Missouri River east of the present main channel, prima facie sovereign lands of Iowa by virtue of the Equal-Footing Doctrine.

As consequence of the operation of Section 194, the United States, which has immunized itself from quiet-title actions concerning lands held in trust for Indians, 28 U.S.C. section 2409a(a), was able to initiate this litigation, and yet saddle Iowa and the non-Indian claimants with the burden of proving their case in disregard of the traditional

[8]It is not clear whether mere "aboriginal" title can constitute the previous possession or ownership sufficient to raise the presumption of title in an Indian tribe. "Aboriginal" possession or ownership is the non-treaty right of occupancy recognized by the United States in the nomadic Indian tribes, protected by the United States from third-party intrusion and terminable only by the United States. *See Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 279 (1955). Amicus does not understand "aboriginal" title to be involved in this case.

rule that a claimant must recover, if at all, on the strength of its own title. *Shapleigh v. Mier*, 299 U.S. 468, 475 (1937); *Wilson I, supra*, 433 F.Supp. at 66; *Wilson II, supra*, 433 F. Supp. at 88.

That this shift in the burden of proof had a profound effect on the result reached by the Eighth Circuit is clear. The Omahas' claims are founded on what was characterized in *Corvallis, supra*, 429 U.S. at 367, as the "so-called exception to the accretion rule." *Wilson III, supra*, 575 F.2d at 638. In *Kansas v. Missouri, supra*, 322 U.S. 213, the claims made by Kansas were remarkably similar, factually and legally, to the claims here being made by the Omahas. The Court wrote in that case:

> "Both by virtue of her position as complainant and on the facts, Kansas has the burden of proof in this case. [Citation omitted.] The disputed location was in Missouri in 1900. It lies on the Missouri side now and has done so, by practically all the evidence, since at least 1927 or 1928. *These facts put upon Kansas the burden of showing that in the meantime the land lay on the Kansas side of the main channel by virtue of natural changes which were effective to change the jurisdiction.*" *Id.* at 228. (Emphasis supplied.)

Not surprisingly, Kansas was unable to carry that burden, and the lands in dispute were held to have been in Missouri. *Id.* at 232. In the present case the Court of Appeals acknowledged that proving the nature of the river's movement was ". . . indeed an onerous burden." *Wilson III, supra*, 575 F.2d at 651. Particularly in view of the fact that Iowa had prevailed on her claims in the District Court, her failure to prevail in the Eighth Circuit is largely attributable to the application of Section 194.



This federal statute purporting to create a presumption in favor of the adverse claimant may not constitutionally be applied against a State claiming sovereign title to the bed of a navigable stream pursuant to the Equal-Footing Doctrine. The *Corvallis* decision unmistakably provides that this application contravenes ". . . an unbroken line of cases which make it clear that the title thus acquired by the State [to lands underlying navigable waters by virtue of the Equal-Footing Doctrine] *is absolute so far as any federal principle of land titles is concerned.*" *Corvallis, supra*, 429 U.S. at 374.

## CONCLUSION

Amici respectfully submit that in this case of acute interest to each State of the Union, the decision of the Court below to apply federal common law and to apply Section 194 to a claim of sovereign-land title shatters long-held precepts fundamental to the fabric of our federal system. Amici urge that this Court overturn the decision of the Eighth Circuit and reaffirm the inveterate rule that allows each State to apply its own real-property law to determine land titles within its borders, regardless of who claims ownership of the property in dispute and, as well, to have its sovereign lands free of any federal principle of land titles.

Respectfully submitted,

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